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tinuing support of public education, safeguarded from infringement by lesser interests.[35] The Congressional mandate is effectuated and the trust funds protected from diversion by the strict and unqualified requirement of compensation at full appraised value. The Court's decision allows maximum beneficial use by the state of trust lands, while insuring that the high place Congress accorded to public education in the hierarchy of competing public policies is not endangered.

MODIFICATION OF IRREVOCABLE INTER VIVOS TRUSTS WITH REMAINDER INTEREST IN SETTLORS' HEIRS

Plaintiff executed a spendthrift trust reserving to herself an income interest for life. Upon her death corpus was to be paid over as she appointed by will, or in default of appointment to "such of her next of kin . . . as by the law in force in the District of Columbia at the death of the . . . [settlor] shall be provided for in the distribution of an intestate's personal property therein." The trust by its terms was irrevocable, and there was no reserved power to alter, amend, or modify. Settlor sought modification of the trust, invoking the doctrine of worthier title in an attempt to construe the future interest as a reversion in herself, rather than a remainder in her next of kin. As both sole beneficiary and settlor, she claimed the power to revoke or modify the trust at will. On appeal from summary judgment for defendant-trustee, the Court of Appeals for the District of Columbia affirmed. *Held:* The doctrine of worthier title is rejected in the District of Columbia; therefore settlor-beneficiary cannot modify the trust without consent of remaindermen; however, when a trust instrument creates a remainder interest in a settlor's heirs or next of kin, a guardian ad litem representing unborn and unascertained heirs may bargain with the settlor for trust modification and consent thereto on their behalf.[1] *Hatch v. Riggs Nat'l Bank,* 361 F.2d 559 (D.C. Cir. 1966).[2]

[35] The New Mexico-Arizona Enabling Act was introduced in the 61st Congress as H.R. 18166. Definite concern was expressed that the state receive adequate return from the disposition of the trust lands for support of public education. See H.R. REP. No. 152, 61st Cong., 2d Sess. (1910). During the act's passage there were substitutions and amendments to strengthen the trust provisions. See 45 CONG. REC. 8487 (1910); S. REP. No. 454, 61st Cong., 2d Sess. 18 (1910). When the bill came before the entire Senate, the chairman of the Senate Committee of Territories stressed the importance of the trust provisions in providing continuing support of public education. See Remarks of Senator Beveridge, 45 CONG. REC. 8227 (1910).

[1] The sole issue in the principal case was whether the court would apply the doctrine of worthier title as a means of trust modification. Affirmance of the judgment for the trustee was without prejudice to future modification attempts by settlor based on the court's dicta.

[2] 16 CATHOLIC U.L. REV. 239; 66 COLUM. L. REV. 1552; 28 OHIO ST. L.J. 166; 51 N.Y.U.L. Rev. 1228.

Any irrevocable trust can be terminated or modified with consent of settlor and all beneficiaries.[3] Such consent is impossible to obtain when there is a remainder interest in the heirs or next of kin of a living person, because all beneficiaries cannot be ascertained.[4] The doctrine of worthier title, molded by judicial construction into a rebuttable presumption against remainders in a settlors' heirs,[5] has often been employed as a means of terminating such trusts. While rejecting the doctrine of worthier title the court in the principal case suggested that guardian ad litem representation of a part of the class of heirs[6] would satisfy the requirement of consent where such interests were present.

Pursuant to the court's proposal, a settlor would first obtain the consent of his heirs presumptive at the time of the action. A guardian ad litem would be appointed to represent the class of additional persons, both living and unborn, who might be heirs at settlor's death. The settlor, heirs presumptive, and guardian ad litem could then negotiate a modification agreement.[7] The court suggested that a settlor's general testamentary power of appointment over trust corpus might be released as consideration for remaindermen's consent to limited corpus invasion. The court stated that appointment of a guardian ad litem was within a court's inherent power without legislative authorization, and expressed the view that settlors and life tenants of trusts established largely for their benefit should not, simply because remainder interests in heirs or next of kin are present, be disadvantaged in efforts to modify such trusts.

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[3] See 361 F.2d at 564; Fowler v. Lampher, 193 Wash. 308, 75 P.2d 132 (1938); RESTATEMENT (SECOND), TRUSTS § 338(1) (1959); 3 SCOTT, TRUSTS § 338 (2d ed. 1956).

[4] See RESTATEMENT (SECOND), TRUSTS § 340(1), comment *d* (1959); 3 SCOTT, *op. cit. supra* note 3, at § 340.

[5] The inter vivos branch of the doctrine of worthier title was first expressed as a rule of construction in Doctor v. Hughes, 255 N.Y. 304, 122 N.E. 221 (1919). For an excellent discussion of the history of the doctrine in American courts see Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction,* 6 U.C.L.A.L. REV. 371 (1959).

For discussion of the desirability of retaining the doctrine of worthier title as a rule of construction see Browder, *Future Interest Reform,* 35 N.Y.U.L. REV. 1255 (1960); Morris, *The Inter Vivos Branch of the Worthier Title Doctrine,* 2 OKLA. L. REV. 133 (1949); Verrall, *supra*; Comment, 47 NW. U.L. REV. 597 (1952).

[6] The appointment of guardians ad litem to represent unborn or unascertained beneficiaries in trust litigation is not uncommon. *E.g.,* Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81 (1955); Petition of Wolcott, 95 N.H. 23, 56 A.2d 641 (1958); Hardy v. Bankers Trust Co., 137 N.J. Eq. 352, 44 A.2d 839 (1945).

[7] The proposition that a settlor and other beneficiaries may bargain in a trust termination situation is not novel. See MacMillan v. Branch Banking & Trust Co., 221 N.C. 352, 20 S.E.2d 276 (1942), where termination was allowed pursuant to an

A settlor's general testamentary power of appointment can be released[8] by a contract with the remaindermen.[9] However, such a release, when given in consideration for permission to withdraw trust assets, might be challenged as a "fraud on the power"—an attempt by the donee of a special appointive power to benefit a non-object of his power.[10] The donee of a general testamentary power of appointment, although he may appoint to his estate, may not appoint to himself inter vivos. If such a donee releases his power of appointment as consideration for the default takers' consent to trust corpus invasion, he is employing his power to obtain a portion of the appointive property he could not obtain by valid exercise of his power. This seems no different than an attempted benefit of a non-object by the donee of a special power of appointment, and consequently is a violation of the donor's intent in granting the power. However, when the donee of the power is also the settlor, as in the principal case, he can in that capacity consent to diversion of the power from its original purpose without valid objection.

The requirement of guardian ad litem consent to modification introduces a limiting factor into the court's proposal. A guardian ad litem stands in a fiduciary relationship to those he represents,[11] being with-

agreement whereby settlor was to pay the only other beneficiary part of the trust fund as consideration for consent to trust termination.

[8] All powers of appointment are releasable except powers in trust. 2 SIMES & SMITH, FUTURE INTERESTS 525 (2d ed. 1956). *Cf.*, RESTATEMENT, PROPERTY § 335, comment *a* (1948 Supp.).

Thirty states have statutes providing for release of powers of appointment. BROWDER & WELLMAN, FAMILY PROPERTY SETTLEMENTS 256 (1965). *E.g.*, WASH. REV. CODE § 64.24.010 (1958):

> Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the holder thereof and delivered as hereinafter provided, unless the instrument creating the power provides otherwise.

[9] See District of Columbia v. Lloyd, 160 F.2d 581 (D.C. Cir. 1947); RESTATEMENT, PROPERTY § 336(3) (1940); 3 POWELL, REAL PROPERTY 333 (1966).

State release statutes commonly provide methods of effectuating a release. *E.g.*, MICH. STAT. ANN. § 26.154(3) (1957):

> A release of a power ... is effective when the donee thereof signs an instrument in writing evidencing an intent thereby to make the release and delivers, or causes to be delivered, the instrument, either:
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> (a) To an adult person who might take any of the property which is subject to the power; or
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> (b) To any trustee or co-trustee of the property which is subject to the power; or
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> (c) To the register of deeds in the county in which any of the property is located or in which the donee resides, and in such case the same shall be recorded by the register.

[10] See Matter of Carroll, 274 N.Y. 288, 8 N.E.2d 864 (1937); RESTATEMENT, PROPERTY §§ 351-54 (1940); SIMES, FUTURE INTERESTS 157-59 (2d ed. 1966).

[11] Dixon v. United States, 197 F. Supp. 798 (W.D.S.C. 1961); Note, 45 IOWA L. REV. 376, 386-87 (1960).

out power to consent to any modification not in the best interests of the unborn and unascertained beneficiaries.[12] If, however, a settlor holds a *general* testamentary power of appointment over trust corpus, as in the principal case, the remaindermen's interest is contingent upon nonexercise of that power. The settlor's release would consequently make the remaindermen's interest more secure, and a guardian ad litem's consent to limited corpus invasion as consideration for this bargain should be binding. The propriety of the guardian giving such consent, however, will depend upon the circumstances of each case, such as a degree of invasion requested in proportion to total trust assets, probability that the power would or would not be exercised, etc. Lack of definite criteria for determining whether a particular modification will benefit remaindermen places a difficult burden on the guardian ad litem. Because of potential personal liability, he is likely to be very conservative in consenting to trust modification.

If the settlor's heirs presumptive in the principal case qualified as representatives under the doctrine of "virtual representation,"[13] their consent to any modification proposal would bind the balance of the class, rendering guardian ad litem appointment unnecessary. Under the doctrine of virtual representation, persons whose interests were created by limitation to the "heirs" or "next of kin" of a living person may be represented by one or more of the presumptive takers under such limitation.[14] This doctrine is premised upon the theory that the

[12] See Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81, 87 (1955); Wogman v. Wells Fargo Bank & Union Trust Co., 123 Cal. App. 2d 657, 267 P.2d 423, 429-30 (1954); Deal v. Wachovia Bank & Trust Co., 218 N.C. 483, 11 S.E.2d 464, 468 (1940).

A guardian ad litem might be liable for any damage sustained by those whose interests he represents caused by culpable omission or neglect. Dixon v. United States, 197 F. Supp. 798 (W.D.S.C. 1961); *In re* Jaeger's Will, 218 Wis. 1, 259 N.W. 842 (1935).

The guardian's fiduciary obligation, however, does not necessarily require that the remaindermen benefit from modification in a monetary sense. In Hardy v. Bankers Trust Co., 137 N.J. Eq. 352, 44 A.2d 839 (1945), a guardian ad litem was allowed to consent to trust modification involving corpus invasion where there was no gain to remaindermen, on the ground that the purpose of the trust would have been defeated if modification had been denied.

[13] Qualification of "representatives" under this doctrine is governed by four rules: (1) [T]he representatives of the class must have the same interest in the controversy as the class represented, (2) the representatives must have no interests in the suit antagonistic to the interests of the class, (3) there must be no fraud or collusion, nor may there be a friendly suit, and (4) the court must find in its judgment that the class was fairly and adequately represented.

Comment, 11 Sw. L.J. 210, 211 (1957). See RESTATEMENT, PROPERTY §§ 183, 185 (1936); SIMES, *op. cit. supra* note 10, at 104.

[14] See RESTATEMENT, PROPERTY § 181(b) (1948 Supp.); SIMES, *op. cit. supra* note 10, at 103. The impossibility of joining all persons who may become heirs or next of kin of a living person by some combination of future events, and hardship in operation of the normal requirement that all living persons be joined as parties,

self-interest of a representative party will redound to the benefit of other members of the represented class.[15] However, there are advantages in employing guardian ad litem representation to supplant this doctrine. Appointment of a guardian relieves the trial court of the burden in determining a representative's qualifications.[16] A guardian may be appointed and a modification action initiated when there are no existing members of a class capable of representing its interests.[17] Furthermore, under the doctrine of virtual representation a representative party is under no personal obligation to promote actively the interests of his class.[18] A lack of adequate representation may not be apparent in the original suit, and the settlement may be subsequently attacked.[19] On the other hand, guardians ad litem are bound by their fiduciary obligation to protect actively all interests they represent, and although their settlements may later be challenged, this should occur less frequently. Also, the complainant may attempt to hold the guardian personally liable for any damage caused by his breach of fiduciary duty[20] in lieu of an attack upon the settlement. Although the doctrine of virtual representation would theoretically apply in trust modification actions, the advantages and additional safeguards of guardian ad litem representation render it more desirable.

Statutes in a few American jurisdictions present an alternative method of handling the problem of consent by unborn or unascertained contingent remaindermen. They provide essentially that a settlor can terminate a trust upon consent of all persons "beneficially interested," and define that class for consent purposes to exclude heirs

warrants recognition of this form of representation. RESTATEMENT, PROPERTY § 181, comment *a* (1948 Supp.).

The *Restatement* further provides that a person in being may be represented in a judicial proceeding if he is one of the permissible objects of a power of appointment, and the donee of the power is joined as a party. *Id.* at § 181(c). The reasoning is that "the possibility of an object taking is so completely within the power of the donee, that it is reasonable to expect that any such object will receive all the protection which his interest merits, through the joinder of the donee." *Id.* at § 181 comment *a*. Although this may be valid in other contexts, when the donee-settlor's power of appointment is general, or when a donee-income beneficiary holds a special power of appointment and the permissible objects are also default takers, the interest of the donee seeking trust modification is adverse to the interests he would represent. Under such circumstances representation by the donee directly conflicts with the policy of protecting all beneficial interests.

[15] Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580, 581-82 (1936).

[16] See note 13 *supra*.

[17] See Peoples Nat'l Bank v. Barlow, 235 S.C. 488, 112 S.E.2d 396 (1960).

[18] See Roberts, *supra* note 15, at 591.

[19] SIMES, *op. cit. supra* note 10, at 104; Note, 48 HARV. L. REV. 1001, 1002-03 (1935).

[20] *Cf.* Dixon v. United States, 197 F. Supp. 798 (W.D.S.C. 1961); *In re* Jaeger's Will, 218 Wis. 1, 259 N.W. 842 (1935).

and next of kin,[21] or to exclude all persons not in being.[22] Such statutes alleviate the harshness of the common law requirement of consent, but sacrifice protection of unborn and unascertained interests.[23]

In the principal case the trust was created primarily for the settlor's own benefit. It seems overly rigid to allow the presence of a contingent remainder in the settlor's next of kin to block trust modification, especially where their remainder interest could be defeated by exercise of a general power of appointment. The court's proposed modification procedure will promote alienability and flexibility in trusts, and will afford relief to the unfortunate settlor who by oversight or ignorance[24] placed his property in irrevocable trust with a remainder interest in his or some other living person's heirs. With guardians ad litem bargaining in behalf of unborn or unascertained remaindermen, jeopardy to their interests is minimized. Furthermore, adoption of such a procedure eliminates the need for reliance on the doctrine of worthier title, whose operation has proven unsatisfactory in several respects,[25] as a means of terminating irrevocable trusts with remainder interests in unborn or unascertained beneficiaries.

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[21] N.Y. PERS. PROP. LAW § 23 (McKinney 1962); N.Y. REAL PROP. LAW § 181 (McKinney Supp. 1966).

[22] MD. ANN. CODE art. 16, § 108 (1957); OKLA .STAT. ANN. tit. 60, § 175.41 (1963); WISC. STAT. § 231.50 (Supp. 1966). A North Carolina statute provides that a grantor of a voluntary trust with a future interest in a person or persons not determined until the happening of a future event may at any time before the happening of the contingency revoke the grant of the interest to such person or persons. However, the operation of this statute has been severely curtailed by amendment. See N.C. GEN. STAT. § 39-6 (1950).

Three states have statutes which allow court authorization of corpus invasion, not provided for in the trust instrument, where there is insufficient income for support or education of an income beneficiary. N.Y. PERS. PROP. LAW § 15-a (McKinney Supp. 1966); N.Y. REAL PROP. LAW § 103-a (McKinney Supp. 1966); PA. STAT. ANN. tit. 20, § 301.2 (Supp. 1966); WISC. STAT. ANN. § 231.21 (1957).

A recent English statute allows court protection of unborn or unascertained interests by providing that a court can consent to a trust modification on behalf of unborn or unascertained beneficiaries if the court is satisfied that such modification would be for their benefit. Variations of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53.

A detailed discussion of the operation of, and variations among, these statutes is beyond the scope of this note. For additional commentary see Scott, *Revoking a Trust: Recent Legislative Simplification,* 65 HARV. L. REV. 617 (1952); Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction* 6 U.C.L.A.L. REV. (1959); Comment, 48 MARQ. L. REV. 376 (1965); 26 N.Y.U.L. REV. 678 (1951); 26 ST. JOHN'S L. REV. 201 (1951).

[23] However, where a rule requiring consent of only living beneficiaries is employed, the interests of those who consent will in many cases be identical to the interests of those excluded—resulting in what amounts to virtual representation of the excluded interests.

[24] Voluntary trusts may be rescinded or reformed only upon grounds of fraud, duress, undue influence, or mistake. RESTATEMENT (SECOND), TRUSTS § 333 (1959).

[25] Although one of the major arguments supporting retention of the doctrine of worthier title as a rule of construction is that it effectuates the intent of the settlor, it has been suggested that the rule more often results in defeating that intent, and that its application has led to strained and inconsistent interpretations of trust